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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN MARTINSON - PETITIONER,

vs.

FARM CREDIT BANK OF ST. PAUL,
FORMERLY KNOWN AS THE FEDERAL LAND
BANK OF ST. PAUL, A CORPORATION,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
NORTH DAKOTA

BRIEF FOR THE RESPONDENT
IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a tenant agricultural real estate who places improvements thereupon and who loses his or her right to sever the improvements as a consequence of failing to follow statutory notice requirements must be named as a defendant in a foreclosure action instituted by the holder of a mortgage on the leased property.

2. Whether the loss of the right by a tenant to sever improvements placed upon agricultural real estate, which loss occurs as a consequence of the tenants failure to follow statutory notice requirements, involves sufficient state action to implicate the due process requirements of the Fourteenth Amendment.

3. Whether the due process requirements of the Fourteenth Amendment are satisfied if a tenant is allowed to

litigate his or her claims to improvements placed by the tenant upon agricultural real estate in the context of an eviction action commenced after the mortgagee has acquired title to the subject real estate.

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TO THE SUPREME COURT OF NORTH DAKOTA

The respondent, Farm Credit Bank of St. Paul, formerly known as the Federal Land Bank of St. Paul, respectfully requests that this Court deny the petition for writ of *certiorari* filed by John Martinson which seeks review of the decision issued in this case by the North Dakota Supreme Court on March 29, 1990.

OPINIONS BELOW

The opinion of the North Dakota Supreme Court is reported at 453 N.W.2d 816 (N.D.1990). It is reproduced in Appendix A to this brief.

JURISDICTION

This is as stated in the petitioner's petition.

CONSTITUTIONAL PROVISIONS INVOLVED

This is as stated in the petitioner's petition.

STATEMENT OF THE CASE

In 1981, Constitutional Martinson obtained a loan from the Respondent, Farm Credit Bank of St. Paul (hereinafter sometimes referred to as the "Bank"). Said loan was in the principal sum of $247,000.00 and was memorialized by a promissory note of date July 22, 1981. Record at 14 *Farm Credit Bank of St. Paul v. Martinson*, 453 N.W.2d 816, 817 (N.D.1990). To secure her payments on this note, Constitutional Martinson granted the Bank a mortgage in farmland she owned in Dickey County, North Dakota. Record at 15.

Prior to Constitutional Martinson mortgaging her farmland to the Bank she had rented this property to her son, the petitioner, John Martinson. During his tenancy and before the Bank obtained its mortgage, John Martinson erected 12 grain

bins on the leased land. No severance agreement, which would have permitted John Martinson to remove the bins at the end of his lease term, was ever negotiated and contrary to NDCC § 47-06-04, John Martinson failed to file written notice with the county registrar of deeds of his intent to remove the grain bins at the end of his tenancy. *Farm Credit Bank of St. Paul v. Martinson*, 453 N.W.2d 816, 817 (N.D. 1990).

Constitutional Martinson defaulted on the payments due to the Bank and ultimately the Bank instituted foreclosure proceedings. Record at 16 and 17. During the course of the foreclosure action, a settlement was reached whereby Constitutional Martinson consented to the entry of a judgment of mortgage foreclosure in favor of the Bank. *Farm Credit Bank of St. Paul v. Martinson*, 453

N.W.2d 816, 817 (N.D. 1990). A sheriff's sale of the mortgaged property was held on November 10, 1987. Record at 18. The Bank was the high bidder at the sheriff's sale and the issuance of sheriff's certificates of sale to the Bank was approved by the Dickey County District Court. Record at 19. At the end of the one year redemption period, the Sheriff of Dickey County issued sheriff's deeds to the Bank. Record at 22 and 23.

Subsequent to the Bank acquiring title and without the Bank's consent, Constitutional Martinson and the petitioner, John Martinson, continued to use and occupy the subject property. Record at 27 and 28. An eviction action was commenced by the Bank in Dickey County County Court. Trial in that case occurred on April 5, 1989 and a judgment of eviction was entered in favor of the Bank.

Farm Credit Bank of St. Paul v. Constitutional Martinson and John Martinson, No. 89-12, Dickey County Court, Ellendale, ND. As part of its judgment the trial court found that the grain bins erected by John Martinson constituted fixtures on Constitutional Martinson's farmland, that the bins had become Constitutional Martinson's property since John Martinson failed to preserve his rights to sever the same and that thus the bins had been acquired by the Bank through its foreclosure action. *Farm Credit Bank of St. Paul v. Martinson*, 453 N.W.2d 816, 817 (N.D. 1990).

The petitioner filed a Motion for New Trial and Motion for Stay. These motions were denied by Dickey County County Court on May 24, 1989. The petitioner then appealed from the "Order of Eviction" and

the Order denying Motion for New Trial and Motion for Stay.

On appeal to the North Dakota Supreme Court, the petitioner argued that the grain bins he erected on the farmland during his tenancy were his personal property and that he was denied due process by not being made a party to the Bank's foreclosure proceedings. *Id.* at 818. The North Dakota Supreme Court rejected Martinson's contention on this point and affirmed the judgment of eviction. *Id.* at 818.

REASONS WHY THE WRIT SHOULD BE DENIED

The Fourteenth Amendment to the United States Constitution provides that a party can be deprived of property rights only if accorded due process. However, this guarantee of due process is applicable only if state action is involved. *Tulsa Professional Collection*

Services, Inc. v. Pope, 485 U.S. 478, 485, 108 Supreme Court 1340, 99 Lawyers Edition 565 (1988). In the *Tulsa* case, a creditor's assignee brought suit against an estate to recover on a debt owed by the decedent. *Id.* at 482. Under Oklahoma law, once the executor of an estate is appointed, he or she must publish notice to creditors. *Id.* at 481. If a creditor fails to file a claim within two months of the date notice is published, the claim is barred. *Id.* The Plaintiff in *Tulsa* failed to timely file a claim with the estate's executor and thus the Oklahoma courts found that the plaintiff's claim was barred. *Id.* at 482.

In finding for the Appellant in *Tulsa*, this Court held that

where state action adversely affects property interests, the due process clause of the Fourteenth Amendment requires that

actual notice be provided to any affected parties whose identities and addresses are reasonably ascertainable. *Id.* at 490. However, only reasonably diligent efforts need be made to uncover the identities of interested parties and notice by publication can suffice as to parties whose identities are not reasonably ascertainable. *Id.*

The type of due process issues involved in the *Tulsa* case do not exist in the instant action. John Martinson's loss of his rights in the grain bins he erected on the property he was leasing from his mother did not come about as a consequence of state action and resulted solely from Martinson's failure to avail himself of available statutory and common law mechanisms to protect his interest in the grain bins.

In North Dakota the general rule is that where a tenant affixes an improvement to leased real estate and fails to negotiate a severance agreement with the landlord, the improvement becomes the landlord's property. However, North Dakota has established special rules by statute to deal with certain improvements to agricultural real estate. Pursuant to North Dakota Century Code §47-06-04, if a tenant erects grain bins on leased property and no written agreement for removal of the grain bins is negotiated between the landlord and the tenant, the tenant has the right to remove the grain bins within eight months of termination of the lease. However, a tenant does not have this right of removal as against the holder of a mortgage recorded after the grain bins are erected unless, within sixty days of the date the tenant places

the grain bins on the leased property, the tenant files with the county registrar of deed's office written notice of his intent to remove the same at the end of the lease.

Had the petitioner, John Martinson, wished to protect his ownership rights in the grain bins as against the holder of any mortgage his mother might subsequently place on the leased premises, he could have negotiated and filed a severance agreement or he could have filed the notice required by North Dakota Century Code § 47-06-04. By failing to file the statutorily required notice the petitioner lost his interest in the grain bins when his mother mortgaged the underlying real estate. The grain bins automatically became the property of his mother and thus, at the time the Bank commenced its foreclosure action against Constitutional

Martinson, John Martinson no longer had an ownership interest in the bins to which due process rights could attach.

Any due process analysis in this case should focus not on the foreclosure action the Bank commenced against the petitioner's landlord, but rather on the provisions of North Dakota Century Code § 47-06-04, which in essence, determined Martinson's rights in the grain bins. In that North Dakota Century Code §47-06-04 provided the petitioner with a simple method of protecting his rights in the grain bins as against any party acquiring a mortgage in the leased real estate, the statute clearly meets constitutional muster.

A second significant difficulty with the petitioner's due process arguments is that since his rights were determined by a statute which is self-executing in nature,

there was insufficient state involvement in the determination of Martinson's rights to implicate the due process protection of the Fourteenth Amendment. As this court discussed in the *Tulsa* case, where the state's role is limited to enactment of a statute, which simply serves to define or limit rights, state action sufficient to invoke the protection of the due process clause will not be found. Similarly, private use of state established remedies or procedures does not rise to the level of state action. In the instant case, John Martinson forfeited his rights in the grain bins by failing to follow the requirements of North Dakota Century Code §47-06-04, (i.e. he failed to file notice of his intention to remove the grain bins at the end of his lease term, so as to protect his interest in the grain bins as against the mortgage his mother granted to

the Bank). The provisions of North Dakota Century Code §47-06-04, which serve to terminate a tenant's ownership interest in grain bins placed on leased property, are as self-executing as statutes of limitation. In this case, the state played no role beyond enactment of North Dakota Century Code §47-06-04.

The third principal difficulty with the petitioner's due process argument is that at the time the Bank instituted its foreclosure action against Constitutional Martinson, any interest the petitioner might have had in the mortgaged property was not reasonably ascertainable by the Bank and thus the Bank had no obligation to name Martinson in the foreclosure action. At the time the Bank instituted its foreclosure action, petitioner's property interest in the grain bins was not filed with the county registrar of

deeds pursuant to North Dakota Century Code § 47-06-04. Thus the petitioner's interest was not reasonably ascertainable. Even if the Respondent was obligated to use reasonably diligent efforts, petitioner's alleged interest in the foreclosed land could not have been reasonably ascertained. Therefore, petitioner was not denied any due process rights by not being named as a defendant in the Bank's foreclosure action.

The petitioner argues that a financing statement filed with the County Registrar of Deed's office that listed him as a borrower on an ASCS loan given for the construction of certain grain bins on the subject property, provided sufficient notice of his interest in the grain bins to require that he be named as a Defendant in the Bank's foreclosure action. This argument is without merit. petitioner

fails to note that at the time the foreclosure action was instituted, the financing statement in question had lapsed. Furthermore, the fact the petitioner may have been obligated to the Agricultural Stabilization and Conservation Service, with respect to a loan given for the construction of grain bins on the subject property, does not mean that the petitioner was the owner of the bins or had any interest in the subject real estate.

The final defect in the petitioner's due process argument is that the petitioner was given every opportunity to litigate his interest in the grain bins during the course of the eviction action the Bank commenced against the petitioner and Constitutional Martinson. The petitioner specifically put ownership of the grain bins at issue during the course

of the eviction action. However, he failed to establish either that he had a severance agreement with Constitutional Martinson or that he had complied with the filing requirements of North Dakota Century Code § 47-06-04 so as to preserve his severance rights against parties acquiring mortgages in the subject real estate. Based on the evidence presented to it, the Court which tried the eviction action held John Martinson had lost his interest in the grain bins to Constitutional Martinson by the time the Bank instituted its foreclosure action and that the Bank had successfully foreclosed as against Constitutional Martinson's interest in the grain bins.

CONCLUSION

Since the petitioner had no ownership rights in the subject grain bins at the time the Bank instituted its foreclosure

action against Constitutional Martinson due process did not require that the petitioner be named as a defendant in that foreclosure action. The petitioner was also given every opportunity to litigate whatever claim he had in the grain bins during the course of the eviction action instituted against him by the Bank. The trail court in the eviction action correctly held that as a consequence of the petitioner failing to preserve his rights to sever the improvements to the mortgaged property he had lost any ownership interest in the same prior to the time the Bank commenced its foreclosure action against the owner of said property.

Dated July 13, 1990.

Respectfully submitted,

Mart R. Vogel
Attorney for Respondent

APPENDIX A

OPINION OF THE NORTH DAKOTA SUPREME COURT

FARM CREDIT BANK OF ST. PAUL, formerly known as the Federal Land Bank of St. Paul, a corporation, Plaintiff and Appellee,

v.

Agnes Irene MARTINSON, Defendant,

and

John Martinson, Defendant and Appellant.

Civ. No. 890237.

Supreme Court of North Dakota.

March 29, 1990.

After mortgagor consented to entry of judgment of foreclosure by mortgagee, mortgagee purchased mortgaged property at sheriff's sale and was issued deeds for unredeemed land, and mortgagee brought eviction proceeding against mortgagor and tenant who continued to use the foreclosed property without mortgagee's consent. The County Court, Dickey County, Southeast Judicial District, Gary D. Neuharth, J., ordered mortgagor and tenant to remove

their property from the subject real estate, and tenant appealed, arguing that grain bins he had erected on property during his tenancy were his personal property and that he was denied his due process rights with respect to ownership of grain bins. The Supreme Court, VandeWalle, J., held that when tenant did not file notice with county registrar of deeds that would have given subsequent mortgage holder notice of intention to remove bins, tenant failed to preserve his right to remove bins as against subsequent mortgagee.

Affirmed.

FARM CREDIT BANK v. MARTINSON N.D. 817
Cite as 453 N.W.2d 816 (N.D.1990)

1. **Mortgages 207**

For agricultural tenant to preserve right to remove grain bin against holder of mortgage recorded after erection of

bin, tenant must file description of bin and notice of his intent to remove it with county register of deeds. NDCC 47-06-04.

2. **Mortgages 207, 434**

When tenant erected grain bins on leased farmland, but did not file notice with county register of deeds that would have given subsequent mortgage holder notice of tenant's intention to remove bins, tenant failed to preserve right of removal against mortgagee whose mortgage was recorded subsequent to erection of bins, and thus, there was no reason to include tenant as party to foreclosure proceedings and mortgagee which was high bidder at sheriff's foreclosure sale was entitled to use of bins.

NDCC 47-06-04.

Jon R. Brakke of Vogel, Brantner, Kelly, Knutson, Weir & Bye, Ltd., Fargo, for plaintiff and appellee.

James R. Britton, Rolla, for defendant and appellant.

VANDE WALLE, Justice.

John Martinson appealed from a judgment of eviction entered by the county court for Dickey County. Martinson contends that the court improperly determined that Farm Credit Bank of St. Paul was the owner of twelve grain bins situated on the property. We affirm.

John Martinson was a tenant on a farm owned by his mother, Agnes Irene Martinson. The farm was located in Dickey County. During his tenancy, John erected twelve grain bins on the leased farmland. John did not negotiate a severance agreement with Agnes regarding the removal of the grain bins upon the expiration of

his tenancy, nor did John file a notice with the office of the register of deeds stating that he intended to remove the grain bins at the end of his lease term as permitted by NDCC § 47-06-04.

In 1981, Agnes obtained a loan from Farm Credit Bank of St. Paul in the principal sum of $247,000. The loan was memorialized by a promissory note, and secured by a mortgage on her farmland. When Farm Credit Bank extended the loan to Agnes and recorded the mortgage, the twelve grain bins were already constructed and affixed to the farmland.

Agnes defaulted on the payment due under the note and Farm Credit Bank ultimately instituted foreclosure procedures. During the course of the foreclosure action a settlement was reached whereby Agnes consented to the entry of a judgment of foreclosure by Farm

Credit Bank. Farm Credit Bank was the high bidder at the sheriff's sale and it was issued certificates of sale by the sheriff. During the redemption period Agnes redeemed a fifteen-acre parcel of the mortgaged property. The grain bins in controversy are not situated on the fifteen acres redeemed by Agnes. The sheriff subsequently issued sheriff's deeds to Farm Credit Bank for the remaining unredeemed land.

After sheriff's deeds were issued to Farm Credit Bank, John and Agnes Martinson continued to pasture livestock and to store grain, farm machinery, and motor vehicles on the foreclosed property although Farm Credit Bank did not consent to the Martinsons' continued occupancy of the land. Farm Credit Bank eventually commenced an eviction proceeding in the county court for Dickey County. A hearing

was held on the eviction action and the county court subsequently issued its findings of fact, conclusions of law, and order for judgment. In its findings of fact the court determined that Farm Credit Bank acquired deeds to the farmland in issue through its foreclosure proceeding, that the grain bins erected by John Martinson constituted fixtures on the farmland and became a part of the property acquired by Farm Credit Bank through its foreclosure, and that John and Agnes Martinson were currently pasturing cattle, storing farm equipment, and storing agricultural cattle upo Farm Credit Bank's land. The trial court ordered John and Agnes Martinson to remove their property from the subject real estate.

On appeal, John Martinson argues that the twelve grain bins he erected on the farmland during his tenancy were his personal property. Because he was not a party to the foreclosure proceedings, John contends that he was denied his due-process rights with respect to ownership over the grain bins when the county court found that the bins were fixtures on the property and that Farm Credit Bank had acquired ownership rights to the bins when it successfully foreclosed on Agnes's farmland. John appears to argue that title to the grain bins was determined in the foreclosure proceedings and that in order to protect his due-process rights he should have been made a party to the foreclosure proceedings or, because he was not a party in those proceedings, the county court should have held the eviction action in abeyance until the district

court has determined title to the grain bins in a separate action in which John is a party. We disagree.

[1,2] Under NDCC § 47-06-04, when a tenant affixes his or her property to the land of another without an agreement for its removal, the property affixed belongs to the owner of the land upon the termination of the tenancy. *See also Schnaible v. City of Bismarck*, 275 N.W.2d 859 (N.D. 1979); *Frank v. Schaff*, 123 N.W.2d 827 (N.D. 1963); *Gussner v. Mandan Creamery & Product co.*, 78 N.D. 594, 51 N.W.2d 352 (1952); *Klocke v. Troske*, 57 N.W. 404, 222 N.W. 262 (1928). However, § 47-06-04 also contains a special provision which applies to grain bins erected on leased premises by agricultural tenants:

> "When any tenant upon agricultural land shall have built, erected, or placed upon such leased premises during his tenancy, any grain bin, granary,

> or structure for the purpose of housing grain, and no written agreement between the landlord and the tenant has been made as to its removal, he may remove the same at any time within eight months after the termination of his lease and the vacating of said premises. *The tenant shall not have said right of removal as against the owner or holder of any mortgage, deed, or conveyance which shall have been filed and recorded after the building, erection, or placing of such bin, granary, or structure, unless such tenant, within sixty days after such building erecting or placing, shall have filed in the office of the register of deeds a written notice describing the land, the character of the structure, and stating that he intends to remove such structure as provided by law.* (emphasis added).

Thus, in order for an agricultural tenant to preserve the right to remove a grain bin against a holder of a mortgage recorded after the erection of the bin, the tenant must file a description of the bin and a notice of his or her intent to remove it with the county register of

deeds. White & Skjerven, *A Survey of Laws Affecting Farm Tenancy*, 37 N.D.L.Rev. 158, 179 (1961).[1]

From our review of the record and transcripts of the county court eviction action, it is clear that the grain bins in controversy were erected on the leased property by John Martinson prior to the recordation of Farm Credit Bank's mortgage. Moreover, John Martinson did not file a notice with the county register of deeds which would have given Farm Credit Bank, as the holder of a mortgage, any notice of John's intention to remove

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[1] While stating that NDCC 47-06-04 provides rather harsh rules for the removal of fixtures by tenants, A Survey of Laws Affecting Farm Tenancy, 37 N.D.L.Rev. 158, 179-80 (1961), notes the harshness of the statute may be mitigated by tenants if they comply with its terms. Thus, for example, the harshness of 47-06-04 can be mitigated by constructing agreements with landlords regarding the removal of fixtures, or by filing a notice with the register of deeds stating that an agricultural tenant plans to remove grain bins at the expiration of his or her lease.

the bins. When John failed to record a notice stating his intention to remove the bins at the end of his lease, he failed to preserve his right of removal against the subsequent mortgagee. As a result, there was no reason to include John as a party in the foreclosure proceedings. Cf. NDCC §§ 32-19-28, 32-19-39, 32-19-40. Farm Credit Bank became the owner of the real estate, including the grain bins, as a

result of the sheriff's deeds, and was entitled to evict the Martinsons from the real estate and the use of the bins.

The judgment of eviction is affirmed.

ERICKSTAD, C.J., MESCHKE, J., and VERNON R. PEDERSON, Surrogate Judge, and HODNY, District Judge, concur.

VERNON R. PEDERSON, Surrogate Judge, and HODNY, District Judge, sitting in

place of GIERKE and LEVINE, JJ., disqualified.